WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
May 2004

These brief synopses do not cover all issues that each case presents. These cases originated in the following counties:

Dane
Eau Claire
Manitowoc
Milwaukee
Outagamie
Ozaukee
Sheboygan
Washington
Winnebago

These cases will be heard in the Wisconsin Supreme Court Hearing Room, 231 East Capitol:

MONDAY, APRIL 26, 2004

09:45 a.m.	#03-0098	Tatum Smaxwell, et al. v. Melva Bayard, et al
10:45 a.m.	#02-2404-CR	State v. Joseph J. Guerard
01:30 p.m.	#02-1681	Laverne Haase, et al. v. Badger Mining Corp., et al.

TUESDAY, APRIL 27, 2004

09:45 a.m.	#01-2649	Martin G. Wenke v. Gehl Co.
10:45 a.m.	#02-3328	Hutchinson Technology, Inc., v. Labor & Industry Review Commission
01:30 p.m.	#03-1493-CR	State v. Todd Jadowski

WEDNESDAY, APRIL 28, 2004

09:45 a.m.	#01-2710	Bonnie Pierce v. Physicians Ins. Co. of Wisconsin, et al
10:45 a.m.	#02-2555-CR	State v. John Allen

THURSDAY, APRIL 29, 2004

09:45 a.m.	#02-0528	Daniel Lynch, et al. v. Carriage Ridge, LLC, et al.
10:45 a.m.	#02-3314-D	In the Matter of Disciplinary Proceedings Against Michael G. Trewin: OLR v. Michael G. Trewin
01:30 p.m.	#02-2817	James Cape & Sons Co. v. Terrence D. Mulcahy, et al.

In addition to the cases listed above, the court will consider and determine on briefs, without oral argument, the following case:

#03-0523-D	In the Matter of Disciplinary Proceedings Against Russell Goldstein, Attorney at Law: Office of Lawyer Regulation v. Russell Goldstein

WISCONSIN SUPREME COURT
Monday, April 26, 2004
9:45 a.m.

03-0098 Tatum Smaxwell, et al. v. Melva Bayard, et al

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a ruling of the Manitowoc County Circuit Court, Judge Patrick L. Willis presiding.

In this case, the Wisconsin Supreme Court will decide whether property owners may be held liable if a dog that they do not own, but that is on their property with their permission, bites someone.

Here is the background: In June 1999, when she was 3 years old, Tatum Smaxwell was mauled by three 75-pound wolf-hybrid dogs on her grandmother's property. Tatum was living in a converted former motel on the property with her mother and two siblings. The dog owner, Melva Bayard, rented another one of the motel units and kept her dogs out back with permission from Tatum's grandmother, Gloria Thompson. On the day Tatum was injured, Bayard had forgotten to latch the kennel.

For about seven years before this incident, neighbors complained regularly about the dogs. The Manitowoc County Sheriff's Department reported more than 70 complaints about the animals running loose and some individuals expressed fear because the dogs looked like wolves and were killing birds. In 1992, one of the dogs bit a sheriff's deputy, and in 1999, Bayard acknowledged that her adult dogs had killed some of her puppies. Trial court testimony indicated that the grandmother was aware of the complaints.

In July 2001, the Smaxwells sued Bayard, Thompson, and Thompson's insurer, Heritage Mutual. They also sued Manitowoc County, alleging that the county knew the dogs were dangerous and should have ordered them removed from the property. Bayard did not respond to the court papers, and has not appeared in this case. Thompson denied that she was liable and, in March 2002, the circuit court agreed, dismissing the claims against all of the defendants.

The Smaxwells went to the Court of Appeals, which affirmed the circuit court, noting that Wisconsin appellate courts have consistently declined to hold property owners liable when someone else's dog bites someone on their land.[1]

Now, the family has come to the Supreme Court, arguing that the courts, in certain cases, have taken a more expansive view of property owners' duties to the people who use their property.[2] The family argues that dogs and other animals – regardless of who owns them – can constitute a dangerous condition or defect on the property and that, therefore, a landlord should be held liable just as s/he would be any other unsafe condition.

The Supreme Court will decide if the Smaxwells may pursue their claim against Tatum's grandmother and her insurer.

[1] Gonzales v. Wilkinson, 68 Wis. 2d 154, 227 N.W.2d 907 (1975); Malone v. Fons, 217 Wis. 2d 746, 580 N.W.2d 697 (Ct. App. 1998)

[2] Pagelsdorf v. Safeco Insurance Co. of America, 91 Wis. 23 734, 284 N.W.2d 55 (1979); Patterman v. Patterman, 496 N.W.2d 613 (Ct. App. 1992)

WISCONSIN SUPREME COURT
Monday, April 26, 2004
10:45 a.m.

02-2404-CR State v. Joseph J. Guerard

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a conviction in Ozaukee County Circuit Court, Judge Thomas R. Wolfgram presiding.

In this case, the Wisconsin Supreme Court will decide whether Joseph J. Guerard, who was convicted of armed robbery, armed burglary, aggravated battery, and theft, should receive a new trial. Guerard alleges that he is innocent, that his brother committed the crimes, and that his trial attorney did not adequately represent him.

Here is the background: In February 1996, a home in Cedarburg was burglarized. A gun cabinet was smashed, five guns were taken, and the resident was attacked. She and another woman who was present picked Joseph Guerard, who was then 21 years old, out of a photo array and in a line-up at the Milwaukee County Jail. He was arrested and charged with several crimes related to the break-in.

During the investigation, Guerard's brother, Daniel, who was 18 at the time, allegedly told several people that it was he, not Joseph, who committed the crime. Daniel allegedly gave detailed descriptions of what occurred and these fit with the victim's account. Among those to whom Daniel allegedly confessed were his sister; a private investigator working for the defense; his mother (who said only that Daniel told her Joseph did not commit the crime); and Joseph's attorney.

During this time, Daniel was charged in Milwaukee County Circuit Court with first-degree reckless homicide in a case unrelated to this one (he ultimately was convicted of that crime). When hearings began in Joseph's case, Daniel "took the fifth", refusing to testify except to deny having confessed to his sister. Joseph's attorney argued to have the sister take the stand, but the judge withheld his decision until the attorney could come up with evidence that might support the sister's testimony, and such evidence was not presented. The attorney did not mention the detailed confession that Daniel allegedly made to the private investigator.

Joseph took the stand in his own defense and maintained his innocence, and his attorney in closing argument said the State had the wrong guy and suggested that the witnesses had confused Daniel with Joseph. Joseph was convicted and sentenced to a total of 52 years in prison.

He made a motion for a new trial, arguing that his attorney had been ineffective because he failed to introduce Daniel's statements to the sister, the mother, and the investigator. The judge concluded that none of these statements would have been admitted into evidence because none was corroborated.

Joseph then took his case to the Court of Appeals, which affirmed the conviction although it called some of the reasons offered by Joseph's trial attorney for not introducing the various statements "nonsensical".

Joseph now has come to the Supreme Court, which will decide if he received adequate representation or if he deserves a new trial.

WISCONSIN SUPREME COURT
Monday, April 26, 2004
1:30 p.m.

02-1681 Laverne Haase, et al. v. Badger Mining Corp., et al.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a ruling of the Winnebago County Circuit Court, Judge Bruce K. Schmidt presiding.

In this case, the Wisconsin Supreme Court will decide whether a supplier of foundry sand may be held liable for the health problems of a foundry worker who developed a lung disease from working around silica sand at the Neenah Foundry from 1955-96.

Here is the background: Laverne Haase developed silicosis, an incurable lung disease, after working for 41 years at the Neenah Foundry. He sued Badger Mining Corp., which supplied the sand to the foundry, alleging that Badger's product caused this life-threatening illness.

Badger mines sandstone and converts it to a product designed for use in foundries, where it is converted into silica dust. Although the workers at Neenah Foundry wore masks, the particles were so small that they could leak through the masks.

The circuit court dismissed Haase's lawsuit, concluding that Badger's product – sand – was a raw material and that a strict product liability claim cannot hinge on a raw material. The judge noted that the sand grains were too large to be harmful when Badger delivered them to the foundry. Haase appealed, and the Court of Appeals affirmed the circuit court.

In the Supreme Court, Haase argues that the lower courts were wrong to conclude that foundry sand is a raw material. He points out that the Supreme Court has, in prior cases, reached the opposite conclusion when it has held that concrete and electricity may give rise to a strict products liability claim.

The Supreme Court will determine whether Haase may pursue his claim against Badger.

WISCONSIN SUPREME COURT
Tuesday, April 27, 2004
9:45 a.m.

01-2649 Martin Wenke et al v. Gehl Co.

The Wisconsin Supreme Court originally heard oral argument in this case on Jan. 16, 2003, after taking the case on a certification from the Court of Appeals. But one justice did not participate and the Supreme Court tied 3-3. The Court then sent the case back to the Court of Appeals, District II (headquartered in Waukesha), which issued a decision that the losing party now has appealed to the Supreme Court. The case originated in Washington County Circuit Court, Judge Patrick J. Faragher presiding.

In this case, the Supreme Court will clarify what effect, if any, its decision in a 2001 case[3] had on a precedent set in a 1990 holding of the Court of Appeals[4]. Both the past cases and this current case center on the interpretation of laws that restrict the timeframe in which an individual may sue after being injured. These laws are commonly known as statutes of limitation or statutes of repose and they ensure that a defendant receives adequate notice that a claim is being filed against him/her, and to protect fundamental fairness: as time passes, memories fade, and evidence is scattered. The difference between statutes of limitation and statutes of repose – if there is a difference – is something the courts have wrestled with over time. Some law dictionaries list them as interchangeable while others make distinctions. Here are definitions of the two from the 1999 edition of Black's Law Dictionary:

> Statute of limitations:
> A statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered).
>
> Statute of repose:
> A statute that bars a suit a fixed number of years after the defendant acts in some way (as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered any injury.

The 2001 case, Landis v. Physicians Insurance Co., involved a medical malpractice claim: Phyllis Landis sued after her husband died following heart surgery. While the defendants in that case argued that the lawsuit could not proceed because the five-year statute of limitations had expired, the Wisconsin Supreme Court ruled that Landis had "tolled" the statute (stopped the clock) by requesting mediation prior to the expiration date (in Wisconsin, all medical malpractice claims must go through mediation before proceeding to trial). A key part of the Court's majority opinion in Landis, written by Justice David Prosser Jr., was the majority's holding that the phrase "any applicable statute of limitation" in the law was meant to include statutes of repose. The dissenters (Justice N. Patrick Crooks, joined by Justices William A. Bablitch and Jon P. Wilcox) in that case disagreed that the Legislature meant to lump the two together.

The holding in Landis may, or may not, have overruled a precedent established in the 1999 case of Leverence v. United States Fidelity & Guaranty. In Leverence, a Court of Appeals case, a clear distinction between statutes of limitation and statutes of repose was recognized. While the trial court and the Court of Appeals in this current case both have found that Landis did overrule Leverence, the Supreme Court will have the final word.

Here is the background in this case: On Sept. 12, 1997, Martin Wenke's right arm was severed while he was operating a hay baler manufactured by the Gehl Company of West Bend, Wis. At the time of

[3] Landis v. Physicians Insurance Co., 2001 WI 86, 245 Wis. 2d 1, 628 N.W.2d 893
[4] Leverence v. United States Fidelity & Guaranty, 158 Wis. 2d 64, 462 N.W. 2d 218

the accident, Wenke was a resident of Iowa. He brought a product liability lawsuit against Gehl Co. in Wisconsin on Aug. 18, 1999. Gehl moved to dismiss the claim, arguing that Iowa's statute of repose provided that no product liability action could be started more than 14 years after the product was purchased. The motion was rejected, but Gehl renewed its motion after the Landis decision. The circuit court – although acknowledging that Landis had not explicitly overruled Leverence – dismissed Wenke's action.

Wenke appealed, and the Court of Appeals, as noted above, initially certified his appeal to the Supreme Court, where it ended in a tie vote. Justices N. Patrick Crooks, David Prosser Jr., and Diane S. Sykes would have affirmed the circuit court, siding with Gehl, while Chief Justice Shirley S. Abrahamson and Justices William A. Bablitch and Ann Walsh Bradley would have reversed the lower court, siding with Wenke. In the year since that tie vote, the composition of the Supreme Court has changed. Justice Jon P. Wilcox, who did not participate due to a temporary illness, is again hearing cases and Justice Patience Drake Roggensack has replaced Bablitch.

The Supreme Court will decide whether Landis overruled Leverence and, by doing this, will clarify whether the Wisconsin courts recognize a distinction between statutes of limitation and statutes of repose.

WISCONSIN SUPREME COURT
Tuesday, April 27, 2004
10:45 a.m.

02-3328 Hutchinson Technology, Inc., v. Labor & Industry Review Commission

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a ruling of the Eau Claire County Circuit Court, Judge Benjamin D. Proctor presiding.

In this case, the Wisconsin Supreme Court will determine what level of impairment should be considered a disability that warrants protection under the Wisconsin Fair Employment Act (WFEA). The Court also is expected to clarify how far an employer must go to accommodate an employee with a disability.

Here is the background: Hutchinson Technology, Inc. (HTI) is a Minnesota-based company that manufactures computer hardware. In 1995, it opened a factory in Eau Claire and Susan Roytek was hired in the factory's photoetch department in 1998. The work required 12-hour shifts rotating through four tasks, ranging from active (constant standing, bending, twisting) to sedentary. The tasks included inspecting very thin sheets of stainless steel, feeding steel sheets into a cutting machine, doing paperwork, and more. Employees in this section worked three-day and four-day weeks.

In the fall of 1998, shortly after she was hired, Roytek was diagnosed with lower-back problems and a degenerative disk disease that kept her off the job for two months. When she returned, her doctor ordered that she work a reduced shift. Because she could not work the required 12-hour shift, HTI terminated Roytek from the $8.75/hour position. The company encouraged her to apply for eight-hour positions as they became available, and it paid her short-term disability through September 1999.

Roytek filed a complaint with the Department of Workforce Development alleging that HTI had discriminated against her based upon her disability. The hearing examiner ruled in Roytek's favor and HTI appealed to the Labor and Industry Review Commission (LIRC), where the company again lost. The LIRC concluded that HTI had not met its burden to show that it would be an unreasonable hardship on the company to accommodate Roytek's disability by permitting her to work shorter shifts. It ordered HTI to reinstate Roytek and give her back-pay. Ultimately, HTI also lost in the circuit court and in the Court of Appeals.

In the Supreme Court, HTI argues that the lower courts gave too much deference to the LIRC determination. It also claims it has no job to give Roytek, because it shut down the photoetch department in 2000 (it did find other jobs for the employees who were working in the department at that time). Finally, the company argues that Roytek does not meet the legal definition of a person with a disability:

> Wisconsin Statutes § 111.32 (8):
> [An individual with a disability] (a) has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work; (b) has a record of such an impairment; or (c) is perceived as having such an impairment.

HTI maintains that Roytek's back problems do not make her a person with a disability who is entitled to legal protections. The company points out that she is not limited in her capacity to work in general, but rather is unable to work the long shifts that this specific job required. HTI is encouraging the Court to use this case to revisit a 1987 decision[5] that has been interpreted to mean that any impairment that causes an employee trouble with a specific task may be considered a disability.

[5] City of La Crosse Police and Fire Commission v. LIRC, 139 Wis. 2d 740, 407 N.W.2d 510 (1987)

The Supreme Court will determine whether Roytek's back problems constitute a disability that triggers the protections of the Wisconsin Fair Employment Act and whether HTI will be required to reinstate her to a position that accommodates her impairment.

WISCONSIN SUPREME COURT
Tuesday, April 27, 2004
1:30 p.m.

03-1493-CR State v. Todd Jadowski

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case began in Sheboygan County Circuit Court, Judge L. Edward Stengel presiding.

In this case, the Supreme Court will decide if fraud ("she lied about her age") is a valid defense to charges of sex with a minor.

Here is the background: On April 15, 2002, Todd M. Jadowski was charged with having sex with a person under the age of 16. The alleged victim, Sarah A.S., was 15 when Jadowski had sex with her in a room that he had rented at the Fountain Park Motel. He originally was charged with drug offenses as well, but those are not part of this appeal.

When police first interviewed Sarah, she told them Jadowski had kidnapped her and held her against her will in his pawnshop. Later, she admitted that this was a lie she told out of fear that her mother would be angry.

Soon after the charges were filed, the trial court held a hearing where Jadowski was permitted to demonstrate that he could prove Sarah had lied about her age. He presented witnesses who said:

1. Sarah used an ID card with a false birth date that showed her to be 19, and she had shown this card to Jadowski.
2. Sarah had told Jadowski and others that she was 19.
3. Sarah looked 19.
4. Sarah mentioned in front of Jadowski that she was old enough to be an exotic dancer.

The trial court, over the State's objection, ruled that Jadowski could present this evidence in his defense during the trial. The State then asked for permission to take this issue to the Court of Appeals, which the judge granted.

Noting that no Wisconsin court has ruled on whether a person charged with sexual assault of a minor may use fraudulent misrepresentation as a defense, the Court of Appeals certified this case to the Supreme Court.

In the Supreme Court, the State argues that the elements it must prove to convict a person of this crime are that the defendant had sex with the victim, and that the victim was under 16 years of age. The statutes[6] specify that mistake about a victim's age is not a defense, but they do not specify whether demonstrating that the victim has lied about her age is a valid defense.

The Court will decide whether Jadowski will be permitted to try to show that he was hoodwinked into committing this crime.

[6] Wis. Stats. § 939.43 (2)

WISCONSIN SUPREME COURT
Wednesday, April 28, 2004
9:45 a.m.

01-2710 Bonnie Pierce v. Physicians Ins. Co. of Wisconsin, et al

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a ruling of the Outagamie County Circuit Court, Judge James T. Bayorgeon presiding.

In this case, the Wisconsin Supreme Court will decide whether a woman may collect damages for emotional distress she suffered as a "bystander" at the stillbirth of her daughter.

Here is the background: In November 1996, Bonnie Pierce, who was 35 weeks pregnant, was hospitalized after a routine doctor visit revealed that she was going into pre-term labor. At the hospital, she questioned a nurse about the activity on the fetal heart monitor, and was told that the baby's heartbeat was irregular because the umbilical cord was around its neck. The nurses told Pierce to lie on her side to limit the stress on the baby, and the doctor checked in briefly and decided to wait through the night before proceeding with a possible delivery. During the night, the baby's heart stopped beating altogether and she was stillborn the following morning via vacuum suction.

Pierce sued the doctor and the hospital. Her claims for the baby's wrongful death, her own physical injuries, emotional damages, and loss of income (she did not work for a year after the death) have already been settled. She still seeks to recover damages as a bystander to the death, arguing that she suffered emotional distress from watching the stillbirth, and therefore should be permitted to pursue a claim just as she could if she had watched her child die in an accident.

The Wisconsin Supreme Court in a 1994 case[7] established three key factors that the courts must consider in deciding if this type of claim – a "bystander" claim – may proceed:

1. The victim's injury must be severe or fatal.
2. The victim and the person seeking to recover damages (the plaintiff) must be related as spouses, parent-child, grandparent-grandchild, or siblings.
3. The plaintiff must have observed either the accident or the scene immediately after the incident (with the victim present).

In a more recent case,[8] the Supreme Court clarified that a person will be permitted to collect damages as a bystander only if that individual actually observes a horrific event. Acute emotional distress, the Court found, is not enough.

The circuit court dismissed Pierce's claim and the Court of Appeals affirmed that decision. Now, the Supreme Court will decide whether Pierce will be permitted to collect damages as a bystander at the stillbirth of her daughter.

[7] Bowen v. Lumbermens Mutual Ins. Co., 183 Wis. 2d 627, 517 N.W.2d 432 (1994)
[8] Finnegan v. Wis. Patients Compensation Fund, 2003 WI 98, 263 Wis. 2d 574, 666 N.W.2d 797 (2003)

WISCONSIN SUPREME COURT
Wednesday, April 28, 2004
10:45 a.m.

02-2555-CR State v. John Allen

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a conviction in Milwaukee County Circuit Court, Judge M. Joseph Donald presiding.

In this case, the Wisconsin Supreme Court will clarify the circumstances under which trial courts may decide post-conviction motions without conducting a hearing. Because defendants who are convicted of crimes often file motions after their conviction seeking a new trial, this is an issue of statewide importance.

Here is the background: In February 2001, John Allen was charged with two counts of first-degree sexual assault of a child and two counts of second-degree sexual assault of a child. The charges arose from incidents alleged by four girls who ranged in age from 9 to 14. Two were his stepdaughters, one was a sister-in-law, and one was his wife's cousin. In May 2001, following a three-day jury trial, Allen was convicted of the charges involving three of the girls but found not guilty in the alleged assault on the fourth girl. The judge sentenced him to a total of 50 years in prison.

Allen filed a post-conviction motion arguing that his trial attorney had been ineffective because he had not pursued evidence that, according to Allen, showed the stepdaughters were lying in order to be allowed to go live with their father. His theory was that the father had put the girls up to it in order to improve his chances of getting custody. He maintained that the father had written a letter to the Sensitive Crimes Unit reporting that Allen had sexually assaulted his daughters, and argued that, if his lawyer had been doing his job properly, he would have tracked down a copy of that letter.

The judge denied the motion without giving Allen a hearing. In his ruling, the judge pointed out that such a letter – if it existed – would only have helped Allen if the jury had believed the father was lying in the letter. A father's letter expressing concern about his daughters' safety in Allen's home, the judge noted, could just as easily have bolstered the prosecution's case.

Allen appealed, and the Court of Appeals affirmed the circuit court's decision that Allen was not entitled to a post-conviction hearing (known as a Machner hearing). In reaching this conclusion, the Court of Appeals (and the circuit court) relied upon a unanimous 1996 Wisconsin Supreme Court case[9] that said a Machner hearing is not necessary if the defendant's motion does not make allegations that, if proven, would entitle him/her to a new trial.

The Supreme Court now is expected to clarify how its 1996 ruling should be applied in cases where defendants are trying to make a case for a new trial.

[9] State v. Bentley, 201 Wis. 2d 303, 548 N.W.3d 50 (1996)

WISCONSIN SUPREME COURT
Thursday, April 29, 2004
9:45 a.m.

02-0528 Daniel Lynch, et al. v. Carriage Ridge, LLC, et al.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a decision of the Dane County Circuit Court, Judge David T. Flanagan presiding.

In this case, the Wisconsin Supreme Court will answer the following question: when a business partnership goes sour and one side is found to have engaged in "oppressive" conduct, what remedy is available to the other side and what purpose should this remedy serve?

Here is the background: Daniel and Judith Lynch are professional horsemen. They formed the Northern Cross Partnership with two other people to develop an equestrian-themed subdivision on 200 acres in the Town of Westport and the Village of Waunakee. Ronald Restaino and Thomas Bunbury -- who was a childhood friend of Daniel Lynch – were asked for help. They became interested in the project, bought out the Lynches' partners, and created Carriage Ridge, LLC, which acquired Northern Cross Partnership's assets. Restaino and Bunbury owned 75 percent of Carriage House while the Lynches owned 25 percent.

After Restaino and Bunbury assumed responsibility for operating Carriage Ridge, they decided to scale back the equestrian facility to 40 acres and delay building it. Bunbury questioned whether the Lynches had the skills necessary to manage the finances of a horse boarding, training, and riding facility, and there was a falling out between the Lynches and Restaino/Bunbury. The Lynches sued.

The circuit court found that Restaino and Bunbury had engaged in oppressive conduct in part by, in late 1998, issuing a "capital call" – a request to all partners for money. The Lynches did not have the money that was requested, and the circuit court concluded that Carriage Ridge had not actually needed additional capital but had issued this call to pressure the Lynches to accept a $75,000 buyout. The Lynches maintained that, according to Bunbury's own figures, their share was worth nearly 10 times that amount.

As a remedy for the oppressive conduct, the circuit court prohibited Restaino and Bunbury from taking any action against the Lynches should they fail to respond to future capital calls. The court also barred enforcement of a provision in the contract that would have permitted Restaino and Bunbury to stop the Lynches from selling their share to other parties. The Lynches, who wanted the judge to order Restaino and Bunbury to buy them out at full market price or else dissolve Carriage Ridge and divide up the assets, were disappointed. They went to the Court of Appeals.

The Court of Appeals affirmed the circuit court's order, concluding that the statutes[10] do not provide for a buyout in this type of situation, and saying that even if the law allowed a buyout, it would be a far too drastic remedy, given that the Lynches were largely unsuccessful in their claims.

In the Supreme Court, the Lynches again make their case for a buyout, evoking corporate scandals at Enron, WorldCom, and Tyco to argue for stronger, clearer remedies for minority partners who have been oppressed by managing partners. The managing partners, meanwhile, have cross-appealed to challenge the part of the case that the Lynches won – the capital call issue – arguing that issuing a capital call to all partners, that requires an equitable percentage payment from each, is not oppressive.

The Supreme Court will clarify what remedies are available when a court determines that there has been oppression in a business relationship, and will determine if the Lynches and Restaino/Bunbury got a fair shake in this case.

[10] Wis. Stats. § 183.0902

WISCONSIN SUPREME COURT
Thursday, April 29, 2004
10:45 a.m.

02-3314-D In the Matter of Disciplinary Proceedings Against Michael G. Trewin:
OLR v. Michael G Trewin

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes disciplinary recommendations to the Supreme Court.

In this case, the Wisconsin Supreme Court will decide how to discipline a lawyer from the Outagamie/Waupaca County community of New London who allegedly loaned money to clients without advising them of a possible conflict of interest.

Here is the background: Atty. Michael Trewin is a 1985 graduate of the UW Law School who focuses his law practice on bankruptcy, especially farm bankruptcies. He also owns a business called Midwest Comics, Inc. Over several years, he represented dairy farmers and small business owners who were struggling with debt. In some of these relationships, he became his clients' banker in addition to their lawyer, lending them money when they were unable to obtain loans elsewhere, and, in one case, buying the home of a man who was facing foreclosure and leasing it back to him. He charged interest rates of about 12 percent and also charged for drafting the loan documents.

Turning a lawyer-client relationship into a creditor-debtor relationship may be problematic. The Supreme Court closely regulates such activity, requiring that attorneys who enter into business relationships with their clients give the clients an opportunity to seek the advice of an independent lawyer and have each client sign a statement affirming that s/he is aware of, and acknowledges, all the risks and conflicts that are presented by the business relationship.

Trewin, while maintaining that he advised his clients of potential conflicts verbally, did not obtain written consent. He argues that he was not familiar with this requirement, and that he should not be punished for a good-faith effort to help his clients. Trewin maintains he engaged in these business deals to provide extra assistance to his clients, many of whom expressed gratitude.

The Office of Lawyer Regulation (OLR), in turn, argues that failure to disclose potential conflicts is a serious violation of an attorney's fundamental duty to his clients. The OLR notes that similar cases have resulted in one-year law license suspensions. The referee who handled this case has recommended a five-month suspension of Trewin's law license.

The Supreme Court will decide whether, and how, to discipline this attorney.

WISCONSIN SUPREME COURT
Thursday, April 29, 2004
1:30 p.m.

02-2817 James Cape & Sons Co. v. Terrence D. Mulcahy, et al.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed an order of the Dane County Circuit Court, Judge Moria Krueger presiding.

In this case, the Wisconsin Supreme Court will clarify what is to happen when a company that bids on a public project discovers, after the bids are opened, that there is a mistake in its bid.

Here is the background: James Cape & Sons Co. bid on a highway interchange project in Milwaukee. As is the custom, the Cape team and other bidders brought groups to Madison the night before the bids were due and set up mini-offices at a local hotel. Cape's team included eight people with computers, printers, and telephones. They worked through the night receiving proposals from prospective subcontractors, accepting or rejecting them, and making numerous calculations and recalculations. In the morning, one hour before the bids were due, Cape received word from one of its low-bid subcontractors, Zenith Tech, that it had made an error. Zenith provided the correct figure – which was about $450,000 higher than its original number – but Cape mistakenly submitted the bid with the initial, wrong number.

The bids were submitted, each with a $100,000 bid bond. When the bids were opened, Cape was the low bidder. It soon discovered that it had submitted the wrong bid and notified the state of the error. The options available to the state, under the statutes[11], are:

- Let the bidder amend the bid.
- Let the bidder withdraw the bid and refund the $100,000.
- Hold the bidder to the low price or force them to forfeit the $100,000.

The state decided to allow Cape to withdraw, but kept the $100,000 bid bond. Cape went to court, arguing that this was not one of the options permissible under the statute. The circuit court agreed, ordering the state to return the money. In reaching its decision, the court focused on a line in the statute that says the bidder may correct the bid or withdraw and receive a refund if the mistake was clearly not caused by any carelessness "in examining the plans or specifications."

The state appealed, and the Court of Appeals affirmed, but noted that government entities and contractors would benefit from a clarification of the circumstances under which contractors are entitled to correct their bid errors, and certified this case.

While all have agreed that the mistake did not arise from examining the plans or specifications, the state argues that the error was not, in fact, free from carelessness/negligence/inexcusable neglect. The Supreme Court will decide whether Cape's money was properly refunded, and will clarify when a bidder must pay the price for a wrong bid.

[11] Wis. Stats. § 66.0901 (5)